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FILED
FEB 13 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 726

FRANK SUTTON, on behalf of himself and others similarly situated,

Appellant,

vs.

TOM ADAMS, as Secretary of State of the State of Florida and EARL FAIRCLOTH, as Attorney General of the State of Florida,

Appellees.

PETITION FOR REHEARING OF DISMISSAL OF APPEAL

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellant
1674 Meridian Avenue
Miami Beach, Florida 33139

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On January 20, 1969, this Court dismissed the appeal for want of a substantial federal question. A copy of the decision is appended.

Appellant urges this Court to grant rehearing because substantial federal questions are raised by the denial of rights under the Constitution of the United States.

Constitutional rights and consequent federal questions are presented in this appeal concerning freedom of speech, voting in national elections, and due process of law.

I

The right to vote has been abridged by Florida Statute 99.161(1)(b). The right to vote is not limited to the mere casting of a ballot. Voters participate in national elections by electing as state officers qualified electors. There is no other manner by which a voter can participate in a presidential election. If the right to vote for electors is curtailed, the right to vote in national elections is equally abridged.

Federal rights are involved since federal elections are involved. The Florida resident participates in national elections through support of a state official, an elector, who then votes for president and vice-president of the United States.

II

The right to freedom of speech is denied by the challenged statute. The importance of this right to freedom of speech, particularly when that right is involved in an election, was affirmed by this court, Mills v. Alabama, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966). In that case the Court considered the right to publish an editorial on an election day as a violation of the Alabama Corrupt Practices Act. The Court stated:

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."

In their concurring opinion Mr. Justice Douglas and Mr. Justice Brennan stated that the rights of free speech and free press in a basic form were concerned, namely the right to express views on matters before the electorate.

The same needs and the same rights are concerned in the case at bar. The broad term "contribution" and its prohibition to a liquor licensee, severely restrict society as well as the licensee. The literal right to freedom of speech is violated because the licensee is prohibited not only from contributing in the form of speeches made by himself, but from hiring persons who may speak in whatever appropriate form is available as well.

III

A substantial federal question is raised by the challenge to Florida Statute 99.161 (1)(b) on the grounds that it is unconstitutionally vague, constituting a deprivation of due process of law.

Because the nature of prohibited contributions is undefined by the statute, there is no guideline for a liquor licensee to follow. Nevertheless, criminal sanctions are applied for violations: Florida Statute 104.27.

When the statute is read in pari materia with other portions of the statutes concerned as suggested by Appellees, it becomes clear that the legislature omitted the very definitions found in Section 99.161(2)(a)(b). The absence of clarifying definitions renders the statute vague.

The Court overlooked and failed to consider the fact that the argument that the statutes

should be read in pari materia supports Appellant's position and not Appellees' position.

It is contended that the specific inclusion of contributions that are prohibited in Section 99.161(2)(a) and (b) such as money, materials, supplies or loans are applicable to liquor licensees.

On the contrary, the challenged statute now provides for a distinction between the general public and the prohibitions contained in 99.161 (2)(a) and (b) and the prohibitions applicable to liquor licensees. In the statute under attack, a liquor licensee is not proscribed as is the general public merely from giving money, materials, loans, etc., he is prohibited from making a contribution "of any nature". The difference is the difference enacted by the legislature. Either the language "of any nature" is so meaningless as to be vague and unconstitutional, or it prohibits political support in any way. If it does, it is contrary to the philosophy stated in Mills, supra, and invades the constitutional rights of a liquor licensee.

In his opinion in the case at bar, Supreme Court of Florida Justice Thornal, concurring in part and dissenting in part, stated:

> "I would strike from the statute the underscored proviso quoted in the opinion by Justice Drew.

> The legislature might have intended what the opinion assumes but it certainly did not so state. I fear that the opinion merely supplies a judicial assumption of legislative intent, contrary to the expressed language of the enactment. The proviso, I think, is unconstitutional. I would strike it and permit the remainder of the statute to stand. I concur in part and dissent in part."

In Epperson v. Arkansas, ___U.S.___, ___S.Ct.___, 21 L.Ed.2d 228 (1968), this court was concerned with a vague statute. In his concurring opinion Mr. Justice Black stated:

> "It is an established rule that a statute which leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies him the first essential of due process. See, e.g., Connally v. General Construction Co., 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S.Ct. 126 (1926)."

A further denial of due process of law arises from the absence of a reasonable classification for excluding liquor licensees from

exceptions to the statute available to members of country clubs, social and fraternal associations and cultural organizations. Refusal to permit members of corporations holding liquor licenses to make contributions permitted by members of corporations in the privileged category of corporations holding liquor licenses, is purely arbitrary.

The Supreme Court of Florida stated in its opinion that the statute was not meant to be interpreted literally, out of context. However, in the absence of a literal interpretation, and the absence of guidelines for any other interpretation, it is impossible for due process of law to be accorded.

IV

Under Epperson, supra, this Court will review constitutional questions concerning the propriety of a statute although those questions were not specifically ruled on by the state court.

In Epperson, supra, this Court decided issues brought before it on appeal, although the state court did not address itself to certain constitutional considerations. This court held its duty to be to decide the issues presented to it.

In the present case, the statute was declared unconstitutional by the trial court on one ground, so that other grounds were not

required to be considered. Reversal in the Supreme Court of Florida was limited to the State's assignments of error concerning only that ground covered in the final decree of the chancellor. Thus, there are questions of constitutionality which have not yet been decided by the courts. The serious question of the meaning of contributions of any nature was not decided in this case by the Supreme Court of Florida.

The procedurally limited nature of opinions rendered subsequent to the decision of the trial court has narrowed some issues and excluded consideration of others. It is respectfully suggested therefore that in the event this Court declines to decide questions raised at trial but not considered by the Supreme Court of Florida that the cause be remanded to afford the Florida court that opportunity. In that way Appellant will not be penalized for having convinced the trial court and thereby precluding his need to assign error. It is respectfully urged, however, that pursuant to Epperson, supra, this Court should decide the questions raised by appeal.

CONCLUSION

It is respectfully submitted that Petition for Rehearing should be granted.

MILTON E. GRUSMARK and
NATALIE BASKIN

By_____
Natalie Baskin

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing of Dismissal of Appeal was mailed to Earl Faircloth, Attorney General and Robert Chastain, Assistant Attorney General, Attorneys for Appellees, The Capitol, Tallahassee, Florida 32304, this____ day of February, 1969.

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellant
1674 Meridian Avenue
Miami Beach, Florida 33139

By_____
Natalie Baskin